

1999

Dumas v. Kitchen : Brief of Appellee

Utah Court of Appeals

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RANDALL DUMAS,

Case No. 990582 C.A

vs.

RHONDA KITCHEN.

Appellee.

On Appeal from Decree of Adoption
Entered in the Third Judicial District Court
of Salt Lake County, Utah
Judge J. Dennis Frederick

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IN THE UTAH COURT OF APPEALS

RANDALL DUMAS,

Appellant,

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Case No. 990582 CA

BRIEF OF APPELLEE

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JURISDICTION

The Court of Appeals has jurisdiction over this appeal pursuant to Utah Code Ann., Sec. 78-2a-3(2)(h).

STATEMENT OF ISSUES

The issues presented to the Court for review is (1) whether there was sufficient evidence for the trial Court to conclude that appellant ("Randall") abandoned his children, thereby terminating his parental rights and granting the adoption of his minor children by the children's stepfather, Robert A. Martinez.

Randall is challenging the adequacy of the findings of fact on these points. Findings of fact are subject to the clearly erroneous standard of review. State ex rel E.D. v. E.J.D., 938 P.2d 298, 301 (Utah App. 1994). A finding is clearly erroneous if it is against the great weight of the evidence or if the Court is otherwise definitely and firmly convinced that a mistake has been made. In re J.N., 960 P.2d 403, 407 (Utah App. 1998). To challenge the sufficiency of the trial court's findings, an appellant must marshal the evidence in support of the findings and then demonstrate that despite this evidence, the Court's findings are so lacking in support as to be against the clear weight of the evidence. In re J.D.M., 808 P.2d 1122, 1124 (Utah App. 1991).

STATUTORY AND CONSTITUTIONAL PROVISIONS

A. Section 78-3a-407. Utah Code Ann.:

The Court may terminate all parental rights with respect to one or both parents if it finds any one of the following:

- (1) that the parent or parents have abandoned the child

(6) that only token efforts have been made by the parent or parents:

- (a) to support or communicate with the child;
- (b) to prevent neglect of the child;
- (c) to eliminate the risk of serious physical, mental, or emotional abuse of the child; or
- (d) to avoid being an unfit parent.

B. Section 78-3a-408, Utah Code Ann.:

(1) In determining whether a parent or parents have abandoned a child, it is prima facie evidence of abandonment that the parent or parents:

- (b) have failed to communicate with the child by mail, telephone, or otherwise for six months;
- (c) failed to have shown the normal interest of a natural parent, without just cause.

STATEMENT OF THE CASE

Petitioners Robert A. Martinez and Rhonda L. Martinez filed a Petition for Adoption on January 14, 1999 for the adoption of Antonio R. Kitchen, born January 22, 1988, and Julian A. Kitchen, born February 17, 1989. Both children were born as issue to the marriage of Rhonda L. Martinez and Randall K. Dumas.

Mr. Dumas was properly notified of the proceeding, and he filed an Answer which denied that he had abandoned the children. Following a trial on May 19, 1999, the Court terminated Mr. Dumas's parental rights and granted the adoption. Mr. Dumas retained new counsel and filed the present appeal.

SUMMARY OF ARGUMENTS

1. Randall failed to marshal the evidence which supported the Court's findings and then demonstrate that such evidence was insufficient to support the findings. If the party challenging the findings fails to marshal the supporting evidence, the trial court's findings will not be disturbed on appeal. Rudman v. Rudman, 812 P.2d 73, 79 (Utah App. 1991). Randall has made only a token effort to marshal the evidence, and there is no basis to even consider disturbing the trial court's findings.

2. The trial court did not abuse its discretion in terminating Randall's parental rights. The Court made detailed findings which support its decision to terminate Randall's parental rights. There was no abuse of discretion, and the trial court's decision must be affirmed.

3. Randall was represented by competent counsel. Randall's counsel cross-examined the witnesses and offered the direct testimony of Randall in opposition to the petition. Randall's representation was competent and effective.

4. The statutory criteria for abandonment are constitutional. Randall's challenge to the constitutionality of the abandonment statutes is misplaced. First, he did not raise this issue at trial. Second, this Court has already determined the statute to be constitutional. Third, the statute merely provides for the establishment of a prima facie case of abandonment when a parent fails to contact a child for six

months. Here the evidence was uncontroverted that Randall had failed to contact his children for years.

ARGUMENT

1. Randall failed to marshal the evidence which supported the Court's findings and then demonstrate that such evidence was insufficient to support the findings. A party challenging the trial court's findings of fact is required to marshal all evidence which supports those findings, and then demonstrate the evidence to be legally insufficient to support the findings. Breinolt v. Breinholt, 905 P.2d 877, 882 (Utah App. 1995). If the challenging party fails to properly marshal the evidence, the trial court's findings will not be disturbed. Id.

Rule 24 of the Utah Rules of Appellate Procedure provides that "all statements of fact and references to the proceedings below shall be supported by citations to the record...." Randall's "Facts," beginning at Page 1 of his Brief do not contain a single citation to the record. Moreover, his facts misstate the record: For example, he claims that "in search of employment appellant thereafter sojourned to California." Mr. Dumas testified that he went to California "because I couldn't deal with what was going on." Tr. p. 29. Also, in his facts, appellant states that "Mr. Dumas made a number of attempts to contact his children but was prevented from doing so by appellee." In his testimony, when asked whether he blamed petitioner for his inability to see his children, Mr. Dumas replied, "Not at all." Tr. P. 32.

The marshaling rule was adopted to ensure that the Appellate Court would not be put in the position of retrying the case without seeing or hearing the witnesses. See Nilson v. Nilson, 652 P.2d 1323, 1324 (Utah 1982) ("This court is reluctant to reconsider evidence that a trial court is in an advantaged position to weigh. Our removal from the participants in a trial puts us in the disadvantaged position of reviewing testimony from a cold record.")

Randall has failed to properly present his appeal, and this Court should assume that the record supports the findings of the trial court.

2. The trial court did not abuse its discretion in terminating Randall's parental rights. Even if Randall had properly marshaled the evidence in support of the findings, which he failed to do, he must show some abuse by the Court in making this determination. The trial court had the opportunity to weigh the credibility and demeanor of the parties. Randall may disagree with the decision, but there was nothing about it that would permit the appellate court interpose its own judgment in this matter.

The records shows that the Findings are rationally based on the evidence presented. Findings 4 through 9 demonstrate the correctness of the Court's decision:

4. Here Mr. Dumas has acknowledged that he failed to communicate with either child for at least six years, having not seen either child since at least September 1992, and perhaps earlier.

5. Mr. Dumas's last communication with either child was a birthday card he sent to the older child, Antonio, in January 1993.

6. The boys have no recall of Mr. Dumas. They do not know who he is, and they certainly do not recognize him as their father. Their father, in their mind, is Robert Martinez.

7. Mr. Dumas's conscious disregard of his parental obligations led to the destruction of the parent-child relationship.

8. Mr. Dumas acknowledged that he has never made a voluntary payment of child support. He is seriously delinquent in his child support obligation, currently owing Rhonda approximately \$50,000. As a result of Mr. Dumas's failure to support his children, Rhonda was required to obtain public assistance.

9. While Mr. Dumas is now paying child support, the Court observes that such payments is prompted by compulsion through the Utah Office of Recovery Services.

The trial court must make rationally based findings from the evidence presented. The record indicates that the trial court properly carried out this function.

3. Randall was represented by competent counsel. To successfully challenge a claim of ineffective assistance of counsel, Randall must show that counsel's performance was objectively deficient and that counsel's deficient

performance prejudiced the case. State in Interest of E.H., 880 P.2d 11, 13 (Utah App. 1994). Randall has not met this burden.

While Randall suggests that counsel could have presented character witnesses on his behalf, he fails to acknowledge that the evidence was largely undisputed: On direct examination by his own counsel, Randall admitted that he had not spoken to the children in seven years. Tr. 30. He admitted that upon his return to Utah in April 1993, he made no effort to establish contact with the children. Tr. 31. When asked whether he blamed his ex-wife for his inability to see his children, Randall's response was, "not at all." Tr. 32. When asked "were you wrong?," Randall's response was, "I was wrong." Id.

On cross-examination, Randall admitted that he knew where the children had lived since at least 1992. Tr. 38-39. He admitted that he had been employed continuously since 1993, but that he had "made a mistake" in not paying child support. When asked his best estimate of what he owed in back child support, Randall replied, "\$48,699." Finally, when asked, "do you think those boys know who you are," Randall answered, "Probably not."

In light of this evidence, there was arguably nothing counsel could have done. Randall has not demonstrated any prejudice in his counsel's representation.

10. The statutory criteria for abandonment are constitutional. Citing only the Constitution, Randall now argues that §§ 78-3a-407-408 are unconstitutional.

Without addressing the constitutionality issue, it should be noted that Randall did not raise this challenge at the trial court level. Consequently, he may not raise it on appeal. State ex rel R.N.J., 980 P.2d 345 (Utah App. 1995). The three exceptions (jurisdiction, plain error, and exceptional circumstances) do not apply.

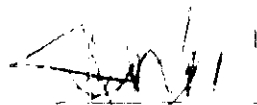
Moreover, this Court has already sustained the constitutionality of § 78-3a-407(6) in Matter of Adoption of B.O., 927 P.2d 202, 208 (Utah App. 1996). While not specifically addressing the six month prima facie language of § 78-3a-408, the Court's main focus was on whether the parent "evidenced a conscious disregard for his or her parental rights." Id. That is what the trial court did here. By his own admission, Randall had not seen his children in years. He made no effort to rebut the prima facie case of abandonment that he established by his own actions. There is no basis to even consider the constitutionality of § 78-3a-408, as there was ample evidence to terminate Randall's rights under § 78-3a-407(6).

CONCLUSION

The trial court properly exercised its discretion. It entered Findings of Fact which show a careful, thorough examination of the evidence. Randall has failed

to marshal any evidence in presenting his challenge. This failure alone precludes the Court from granting the relief he requests. Randall's appeal is without merit.

DATED this 12 day of August 2000.



JAMES H. WOODALL
Attorney for appellee

CERTIFICATE OF DELIVERY

I certify that I caused two copies of the foregoing **BRIEF OF APPELLEE** to be delivered to the following on August 2, 2000:

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